

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

**FILED BY**

**JUL 14 2005**

Thomas M. Gould, Clerk  
U. S. District Court  
W. D. OF TN, Jackson

PYROTEK, INC.,

Plaintiff,

VS.

MARK QUACKENBUSH,

Defendant.

No. 05-1144-T/An

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ORDER GRANTING MOTION TO REMAND

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The plaintiff, Pyrotek, Inc., filed this action in the Circuit Court of Gibson County, Tennessee, on April 15, 2005. Defendant Mark Quackenbush removed the action to this Court on May 26, 2005 pursuant to 28 U.S.C. § 1441 *et seq.*, on the basis of diversity of citizenship. See 28 U.S.C. § 1332. On June 22, 2005, plaintiff filed a motion to remand the action to state court on the grounds that removal was untimely. Defendant has not responded to the motion to remand.

Pursuant to the removal statute, a notice of removal "shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based ...." 28 U.S.C. § 1446(b). This statutory time limit, while not jurisdictional, is mandatory and is strictly enforced, absent a finding of waiver or estoppel. See Somlyo v. J. Lu-Rob Enter.,

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with Rule 58 and/or 79 (a) FRCP on 7/15/05

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Inc., 932 F.2d 1043, 1046 (2<sup>nd</sup> Cir. 1991); City of Albion v. Guaranty Nat'l Ins. Co., 35 F. Supp. 2d 542, 544 (W.D. Mich. 1998). The party seeking removal has the burden of establishing that removal is proper. Gafford v. General Elec. Co., 997 F.2d 150, 155 (6<sup>th</sup> Cir. 1993).

In the notice of removal filed in this case, it is recited that the defendant was served with the summons and complaint on April 29, 2005. Service on that date would make the removal on May 26<sup>th</sup> timely. However, in the motion to remand, plaintiff asserts that the defendant was served with the summons and complaint several days prior to April 29, 2005, rendering the notice of removal untimely.

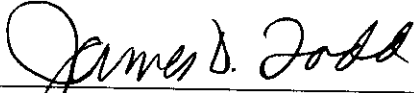

A copy of the return of service shows that on April 15, 2005 the summons and complaint were mailed from Trenton, Tennessee, to the defendant at an address in Winterhaven, Florida, by certified return receipt mail. The date of delivery is not indicated on the return receipt card and the date of the postmark is illegible. However, counsel for the plaintiff, Limmie Lee Harrell, Jr., states in an affidavit that the return receipt card signed by the defendant was received by mail at his office in Trenton, Tennessee on Monday, April 25, 2005. The U.S. Postal Service does not deliver mail on Sunday; therefore, the very latest date the defendant could have received the summons and complaint was Saturday, April 23, 2005.<sup>1</sup> Harrell's affidavit has not been refuted by the defendant.

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<sup>1</sup> Given the distance between Winterhaven, Florida and Trenton, Tennessee, the actual delivery may have occurred even earlier. It is perhaps possible, but unlikely, that the return receipt card would have been received in Tennessee on Monday the 25<sup>th</sup> if delivery of the summons and complaint was made in Florida on Saturday the 23<sup>rd</sup>.

As the evidence indicates that the summons and complaint were received by the defendant, at the latest, on April 23, 2005, the notice of removal filed on May 26, 2005 was untimely and removal was improper. Therefore, plaintiff's motion to remand is GRANTED and this case is hereby REMANDED to the Circuit Court of Gibson County, Tennessee, at Trenton. The Clerk of Court is directed to prepare a judgment accordingly.

IT IS SO ORDERED.

  
\_\_\_\_\_  
JAMES D. TODD  
UNITED STATES DISTRICT JUDGE  
  
\_\_\_\_\_  
DATE



## Notice of Distribution

This notice confirms a copy of the document docketed as number 5 in case 1:05-CV-01144 was distributed by fax, mail, or direct printing on July 15, 2005 to the parties listed.

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Honorable James Todd  
US DISTRICT COURT